

May 2000
Bid Waivers

The PECFA program has recently been receiving numerous requests to "waive" the requirement that a remediation site go through the public bid process to determine the least costly method of remediating the site.

The public bidding of remediation sites, to determine the least costly remedial alternative, was started by the PECFA program and then formalized in the biennial budget bill. In that document, the Departments of Natural Resources and Commerce were instructed that if:

"the cost to complete a site investigation, remedial action plan and remedial action for an occurrence exceeds \$60,000, the department of commerce shall implement a competitive bidding process to obtain information to assist in making the determination" of the least costly method of remedial action.

Since the creation of this directive, there has developed a fairly regular stream of requests for waivers of the requirement to go through the bid process. The rationale provided for the waiver requests vary but some examples are:

- The owner wants to stay with their original consultant.
- A desire to not wait for the bid process to be completed because of a property sale, facility rebuild or a road project.
- Soils may become accessible because of a tank removal or similar event.
- The remediation has already been started (perhaps without required approvals).
- The owner wants to implement a specific remedial alternative.

Although the departments have been given a level of authority to waive the requirement of the bidding process, any expectation that it is going to be a common process should be discarded. The two departments are currently working on only one waiver at the present time. This site has significant methyl-tertiary-butyl-ether (MTBE) contamination that has impacted over twenty water supply systems. The waiver is being provided for action to be completed to capture and remove high levels of MTBE in soils and groundwater that, if left in place, would continue to cause expansion of the area of MTBE contamination and the contamination of additional wells.

Claimants and consultants anticipating requesting waivers from the bid process should keep in mind that in the viewpoint of the PECFA program:

1. The legislature and the Audit Bureau expect the norm to be the bidding of sites. The operating premise being to bid sites in order to use market factors and a full consideration of all remedial options as a means to reduce remediation costs.
2. The approval of waivers should be reserved for the largest environmental issues where specific action can be planned and used to deal with a core problem.
3. Waivers should be for specific actions that will be used to stabilize a site or control contaminant migration. Approval of a waiver does not automatically mean that the site will

not go through the competitive bidding process in the future to obtain the lowest cost to closure.

4. The use of the waiver process is not an open checkbook. All waivers will also carry with them a hard cap on the work to be performed. In some instances it may be difficult to establish what the cap amount should be and negotiations may have to take place.

Although the legislature provided for the potential of waivers from public bidding, they will be very limited and approved only at the total program level. The difficulty of setting a hard cap on a waiver, the expectations of bidding as a cost control tool and the amount of staff time that will be consumed by each waiver all argue for waivers being a very rare breed of animal.